

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

3 UNITED STATES OF :
4 AMERICA, :
 Plaintiff :
5 :
 v. : CA-04-4-Erie
6 :
7 CITY OF ERIE, :
 Defendant :

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13 Fairness Hearing held in the above-captioned
14 matter on Thursday, June 15, 2006, commencing at
15 9:38 a.m., before the Honorable Sean J. McLaughlin,
16 Federal Courthouse, 17 South Park Row, Erie, PA 16501.

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25 Reported by Sonya Hoffman
 Ferguson & Holdnack Reporting, Inc.

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A P P E A R A N C E S

Joseph B. Spero, Esquire
(For the Police Relief and Pension Association)

Sharon Seeley, Esquire
(For the United States of America)

Gerald J. Villella, Esquire
(For the City of Erie)

Kenneth A. Zak, Esquire
(For the City of Erie)

Caleb Nichols, Esquire
(For Ethel Easter)

Marsha Hernandz
(For herself)

Christopher Cimballa, Esquire
(For the Fraternal Order of Police, Lodge No. 7)

Frances Booth
(For herself)

I N D E X

Fairness Hearing 3

Order of Court31

1 THE COURT: Good morning. Please be seated. This is
2 the time that we've set for the Fairness Hearing with
3 respect to the proposed Consent Decree at Civil Action 04-4.

4 I have received and reviewed a number of objections to
5 the proposed decree and/or just commentary on it. Of those
6 objections, only a certain number of people actually asked
7 to be heard at the hearing today. And I suppose in terms of
8 moving it along, I guess what I would propose to do is this:

9 I'm going to indicate the name of the individual, I'm
10 going to go right through the list, and if you're here and
11 you had asked to speak, I'm going to permit you to be sworn
12 at the podium. And then as it is appropriate, either
13 counsel for the City or counsel for the United States, I'm
14 going to give you an opportunity to come up and address any
15 of the objections or concerns that may have been raised.

16 That having been said, is -- and if I mispronounce any
17 of these names, I apologize in advance. Is Mr. Gregory
18 Baney, Jr. here -- actually, I apologize, Mr. Baney had not
19 requested to speak. I was looking at the wrong pile.

20 Is a representative of the Police Relief and Pension
21 Association present?

22 MR. SPERO: Yes, Your Honor.

23 THE COURT: Do you want to come up. Identify yourself
24 for the record, please.

25 MR. SPERO: Joseph Spero for the Police Relief and

1 Pension Association of Erie, Pennsylvania.

2 THE COURT: All right.

3 MR. SPERO: Your Honor --

4 THE COURT: Although, it probably is not going to be
5 technically necessary, we're going to swear everyone in as
6 they come up. So would you please swear Mr. Spero.

7

8 J O S E P H S P E R O, first having
9 been duly sworn, testified as follows:

10

11 THE COURT: All right, sir. Go ahead.

12 MR. SPERO: The Pension Association recognizes the fact
13 that retroactive seniority is defined in the Consent Decree,
14 as entered by yourself, as "seniority for all purposes,
15 except for purposes of pension benefits." Nevertheless, the
16 Pension Association has some concerns regarding the
17 vagueness of the definition for pension benefits in
18 retroactive seniority.

19 Specifically, there's going to be an actuarial impact
20 on the Pension Association as well as the City because for
21 purposes of determining contributions as well as the
22 benefits, actuarial tables are going to be used for the
23 funding and the administration. Taking into account in
24 those actuarial tables are going to be the age of the
25 individual, date of hire, their wages; so part of the

1 calculation -- as well as a mortality table; so part of
2 these calculations for retroactive seniority, we're saying
3 doesn't directly affect and isn't supposed to be calculated
4 for purposes of pension, the pension is going to be
5 indirectly affected by these potential hires in that they're
6 going to be getting credit for service where they haven't
7 served.

8 And if I'm reading your Consent Decree correctly,
9 they're going to be admitted at a certain wage, they're
10 going to get certain credits, and these matters get rolled
11 into the calculations for pension benefits. For age and
12 anniversary dates, these are going to be affected. Final
13 pay per the City ordinance is defined as including regular
14 pay, longevity increments, holiday pay, and paid
15 contributions through the plan by the participant. Again,
16 while the retroactive seniority dates for this individual
17 hire is not going to be calculated, the longevity
18 increments, the holiday pay, those are being taken into
19 account for these individual hires which are going to skew
20 the Pension Association contributions and the actuarial
21 tables that are being used.

22 For the three-year -- well, it's the Reverse Drop
23 Program that the City had entered into with the police
24 pension whereby police officers can elect a lump-sum
25 distribution at the time of retirement and look back

1 anywhere from one to three years. Now, that one- to
2 three-year period is based on their final pay. So again, we
3 have a final pay issue and the retroactive seniority for
4 dates of hire and things of that nature.

5 Now, all of these matters may or may not have been
6 taken into account by the United States and the City of Erie
7 when they entered into this Consent Decree, and that's why
8 we did file our objection with the Court to look for a
9 little clarification on these issues as to how both the City
10 as well as the Pension Board should handle these issues in
11 the event that these individuals are hired with this
12 retroactive seniority so that we don't end up in front of
13 either Your Honor or another judge some years down the road
14 with people having a problem with this Consent Decree and
15 how their pension is supposed to be calculated.

16 Finally, there is the issue regarding vesting, which is
17 12 years of continuous service. So if we're reading the
18 Consent Decree correctly, if an individual is hired and
19 they're immediately given credit for eight years of service,
20 but not for pension purposes, then they're going to have to
21 work an additional -- their 12-year period to vest for their
22 pension. So they're going to have 12 years for pension
23 purposes, but 20 years for credit within the Police
24 Department. Again, that goes to the longevity, the holiday
25 pay, and final base pay, and things of that nature, which,

1 again, all get rolled up into the pension plan.

2 THE COURT: All right. Thank you very much, Mr. Spero.
3 Ms. Seeley, do you want to come on up.

4 MS. SEELEY: Your Honor, we did attempt to take the
5 affect on the pension fund into effect when we negotiated
6 the Decree. We did look at the ordinance of the statute.
7 It is very complicated and I'm sure we didn't understand it
8 as well as Mr. Spero does, but I think that what we tried do
9 is to be very simple in the Decree and in the definition say
10 that retroactive seniority didn't apply to pension benefits.

11 We think that what that means in terms of vesting, I
12 think, is easy. It does mean that the person work would
13 actually have to work 12 years in order to vest, not be
14 credited with retroactive seniority for that purpose. In
15 terms of the other effects, I think that the only effect
16 that it would have on the pension is certainly a person's
17 age, is a person's age. And if the person is older now than
18 they were when they would have been hired, there's not much
19 we can do about that. I think the real age has to be used.

20 And by the same token, the actual salary, which does
21 depend to some extent on longevity pay and essentially
22 seniority, that will be different than it would have been if
23 this were a completely new hire. But I think those are the
24 only respects in which it's different to age and pay.

25 THE COURT: Is there anything else you want to say on

1 this point?

2 MS. SEELEY: No.

3 THE COURT: How about on behalf of the City?

4 MR. VILLELLA: Yes, Your Honor. As you will recall,
5 this issue of retroactive seniority was one of the most
6 contentious problems that we presented when the settlement
7 negotiations were going on. We felt that there would be a
8 lot of objections to it, as there have been. We do see that
9 the definition of retroactive seniority does say that it's
10 seniority for all purposes except for purposes of pension
11 benefits, consideration --

12 THE COURT: That's way too fast for the court reporter.

13 MR. VILLELLA: All right. That the retroactive
14 seniority defined in the definitions of the Consent Decree
15 is seniority for all purposes except for purposes of pension
16 benefits, consideration, or eligibility for promotion, or
17 requirements for completion of a probationary period.

18 How the actuary would deal with that in calculating the
19 individual -- pension of an individual who was hired subject
20 to this, I can't tell for certain. I don't know how much of
21 an impact it is, but certainly the consideration they
22 brought up is well-taken. We don't think it was sufficient
23 enough for us not to enter into the Consent Decree.

24 THE COURT: What do you mean the position they've taken
25 but for it is well-taken; what do you mean by that?

1 MR. VILLELLA: Their concern certainly is one which we
2 would expect them to be raising in that they would react to
3 even the terminology of retroactive seniority to mean that
4 people would be getting paid for years service that they did
5 not accrue. And to some extent that may be true, but,
6 however, it is excluded from the definition of -- seniority
7 pension is excluded from the definition of retroactive
8 seniority.

9 THE COURT: All right. Thank you. Is Judith Garcia
10 here? All right. Is Ethel Easter, through her counsel,
11 here?

12 MR. NICHOLS: Judge, I'm Caleb Nichols representing
13 Ethel Easter.

14 THE COURT: Come on up to the podium, Mr. Nichols.
15 Would you swear in Mr. Nichols, please.

16 MS. SCIBETTA: Would state your name for the record,
17 please.

18 MR. NICHOLS: Ethel Easter.

19 THE COURT: No. You're not Ethel Easter.

20 MR. NICHOLS: I'm sorry. What did you say?

21 THE COURT: She said state your name for the record.

22 MR. NICHOLS: Caleb Nichols, representing Ethel Easter.
23

24 C A L E B N I C H O L S, first having
25 been duly sworn, testified as follows:

1

2 THE COURT: Mr. Nichols, just to move it along, having
3 read the objection in Ms. Easter's objection, as I
4 understand it, she's complaining -- tell me if this
5 oversimplifies it, she's complaining that she, in fact, took
6 the PAT test but does not show up on the list of potential
7 eligibles; is that right?

8 MR. NICHOLS: That's exactly correct, Your Honor.

9 THE COURT: What can you tell me about that in terms of
10 when she took the test, how many times she took the test,
11 and what evidence you have that she took the test?

12 MR. NICHOLS: As her counsel, she has represented to
13 me --

14 THE COURT: I'm going to want to hear from her
15 directly; is she here?

16 MR. NICHOLS: She's not here. She now resides in
17 Houston, Texas.

18 THE COURT: Well, that makes it very difficult, but go
19 ahead.

20 MR. NICHOLS: She is -- as her counsel, she's
21 represented to me that she took the test in 1996 and she was
22 then employed with the Police Department as a
23 CSO/Communication Specialist. And, I believe, she said that
24 she commenced employment with the Police Department in 1995.
25 Because her name did not appear on the list, she filed a

1 petition -- an objection and a petition asking that her name
2 be placed on the list.

3 I do have a letter here from a former official of the
4 City who attests to the fact that Ms. Easter did take the
5 test, that she took the physical exam. I have a letter from
6 him.

7 THE COURT: Who is it?

8 MR. NICHOLS: Homer Smith. He was then serving as the
9 EEO/Labor Compliance Officer for the City of Erie and he
10 attests to that she did, in fact, take the test.

11 THE COURT: Let me see the letter.

12 MR. NICHOLS: (Complies.)

13 THE COURT: Mark it as Easter Exhibit No. 1.

14 (Easter Exhibit No. 1 marked for identification.)

15 MR. ZAK: Your Honor, if it please the Court, we have
16 not received a copy of that.

17 MR. NICHOLS: I will get a copy.

18 THE COURT: I'll have this one brought back as soon as
19 I'm done reading it. Well, this is what it says, and then
20 I'll give you a copy. Do you have a copy? For the record,
21 it's from Homer L. Smith, dated June 14, 2006, "To whom it
22 may concern: Please be advised that I served in the
23 capacity of the EEO/Labor Compliance Officer for the City of
24 Erie from the period of May 1989 through September 2005.
25 During this time I was involved with assisting and

1 recruiting minorities and women to apply for police and fire
2 candidates. In 1996 Ethel Easter, who had been hired by the
3 City of Erie as a CSO/Communications Specialist Officer,
4 completed an application for police officer for the City of
5 Erie and took the physical exam. If you should require
6 additional information, feel free to contact me at," the
7 phone number, signed Homer L. Smith, Jr.

8 Is there anything else that you want to tell me about
9 this?

10 MR. NICHOLS: That's all, Your Honor. She asked that I
11 represent her on this particular point.

12 THE COURT: Where is she now?

13 MR. NICHOLS: She's now employed with the Police
14 Department in Houston, Texas.

15 THE COURT: All right. Thank you. Let me hear from
16 the City on this.

17 MR. VILLELLA: Your Honor, we would object to the
18 letter as being hearsay --

19 THE COURT: Come up to the podium, please.

20 MR. VILLELLA: First of all, I think we would object to
21 Mr. Smith's letter in that he should be available and this
22 is a letter which doesn't allow him to be questioned about
23 as to its content that's be offered to the truth of the
24 matter asserted. But, beyond that, of course --

25 THE COURT: Let me ask this: How were the rolls of the

1 people who took the PAT test maintained and what effort or
2 efforts did the City make to determine whose names
3 appropriately appeared on those lists?

4 MR. VILLELLA: The City Civil Service Board kept the
5 roster of all the applicants who applied for the test, took
6 the test, failed or passed, and would do that each year --
7 every two years that the test was administered.

8 The records for 1996 and '98, unfortunately, copies of
9 them were discarded or destroyed by someone who used work in
10 the human resources office, sometime perhaps in 2001 or
11 2002. No one asked the Solicitor's Office whether we should
12 maintain them. At that point, the Justice Department had
13 not filed suit or had not indicated they were going to do
14 so. No one knew that these records might be important. And
15 during the discovery process in the lawsuit, it was
16 determined that we no longer have records showing the
17 applications of the people who took the test in 1996 and
18 1998.

19 I believe Justice has more information that they were
20 able to glean from additional sources as to who took the
21 test or didn't take the test in '96 or '98, and they cannot
22 confirm that Ms. Easter did take it. And we need to know
23 whether --

24 THE COURT: Well, I'll ask them. But at least insofar
25 as the City is concerned, the City, by virtue of discarding

1 the records for '96, has no independent way of confirming
2 whether she took the test or not; is that right?

3 MR. VILLELLA: At this point I would say that we don't
4 have any way of confirming that, other than asking
5 individuals who were there at the time whether they remember
6 her taking it or don't remember her.

7 THE COURT: Let me hear from Ms. Seeley on this point.

8 MS. SEELEY: Your Honor, Mr. Villella is correct that
9 the City apparently discarded the 1996 applications, so they
10 don't have the actual application files. However, there was
11 a document provided to us during discovery that the United
12 States used to create the list of the 1996 applicants that
13 appears in Appendix 8 of the Decree. And that was part of
14 the Appendix that we filed with our brief, Exhibit No. 13,
15 which it was handwritten, but it was only prepared by the
16 City apparently at the time of applicants. And it indicated
17 who passed and who failed the physical agility test. And
18 that was one of the things that we looked at to determine
19 whether Ms. Easter did take the test, and she doesn't appear
20 on that list.

21 I do agree with Mr. Villella that it's a little bit
22 difficult without having either Mr. Smith or Ms. Easter here
23 to probe how they remember that it was 1996. And one issue
24 with that, Your Honor, is that, if you recall, the same test
25 was given in the same location in 1994. So it's possible

1 that she took the test in 1994, same place, same test, and
2 they're mistaken about the date. But without being able to
3 question them about that, we don't know.

4 One thing, if I may, Your Honor, a suggestion as to
5 what we could do at this juncture without witnesses here is
6 that the United States wouldn't object if the Court wanted
7 to add her to Appendix A conditionally --

8 THE COURT: Conditionally?

9 MS. SEELEY: Yes. And then if at the -- by the time of
10 or at the individual fairness hearing, which will occur some
11 months from now after we've had actual claims, she can
12 establish that she did, in fact, apply during those dates
13 and she's otherwise qualified and she will finally be added.

14 THE COURT: All right. Thank you. Someone in the back
15 had their hand raised a minute ago. Do you want to come up.
16 Come on up to the microphone there. Do you want to tell me
17 your name, please.

18 MS. HERNANDZ: Marsha Hernandez.

19 THE COURT: Would you spell it for the court reporter.

20 MS. HERNANDZ: M-A-R-S-H-A H-E-R-N-A-N-D-Z.

21 THE COURT: All right. Swear her in, please.

22

23 M A R S H A H E R N A N D Z, first having
24 been duly sworn, testified as follows:

25

1 THE COURT: The only thing I'm going to ask you to do
2 is speak directly into the Mic. What is it you wanted to
3 add?

4 MS. HERNANDZ: Just wanted to comment, when he brought
5 it up, that his client wasn't on the list because I do know
6 a few people that took it and passed it and they're not on
7 the list. The list is actually just people that failed.

8 THE COURT: You're talking about the list that was
9 maintained by the City.

10 MS. HERNANDZ: Yes. But I wasn't aware at that time
11 when I raised my hand that there was a missing list for '96
12 and '98.

13 THE COURT: Okay. Thank you very much. Is that
14 Counsel's understanding that the list only included failed
15 applicants?

16 MS. SEELEY: No, Your Honor. Appendix A to the Decree
17 only includes failed applicants, but the actual list of
18 applicants that we got from the City that Appendix A was
19 based on were people --

20 THE COURT: People who took it and passed it and took
21 it and didn't pass it.

22 MS. SEELEY: Yes, Your Honor.

23 THE COURT: All right. Is Sabrina Thompson here? All
24 right. It wasn't clear to me that this individual had
25 requested to speak or not because her objections were not

1 filed on the regular form. Officer Mark Sanders, is he
2 here? All right. Those are all the individuals that my
3 records reflect had specifically requested to speak. Is
4 there anyone else who believes that they had and I
5 inadvertently missed them?

6 MR. CIMBALLA: Yes, Your Honor. My name is Chris
7 Cimballa on behalf of the Fraternal Order of Police.

8 THE COURT: Come on up. Would you please spell your
9 name for the court reporter and we'll swear you in.

10 MR. CIMBALLA: Okay. It's Christopher Cimballa,
11 C-I-M-B-A-L-L-A. I represent Lightman and Welby and the
12 Fraternal Order of Police, Lodge No. 7. And to expedite
13 things, Your Honor, I'm speaking on behalf of Lodge No. 7,
14 as well as its membership.

15
16 C H R I S T O P H E R C I M B A L L A, first
17 having been duly sworn, testified as follows:

18
19 MR. CIMBALLA: Your Honor, I have an exhibit, if I
20 could present it to you.

21 THE COURT: All right.

22 MR. CIMBALLA: The exhibit is the collective bargaining
23 agreement between the City and the Fraternal Order of
24 Police, Lodge No. 7. In addition to the master agreement,
25 you'll also find two amendments. This agreement is current

1 from January 1, 2006 through December 31, 2008.

2 Our principal objection, Your Honor, is the retroactive
3 seniority provided by the Consent Decree. There are several
4 provisions of the collective bargaining agreement that are
5 affected. Principally, the claimants were never parties to
6 this bargaining unit. In addition, it's my understanding
7 that they haven't taken the written, oral, psychological
8 exams --

9 THE COURT: If the claimants had been parties to the
10 bargaining unit, we never would have been here --

11 MR. CIMBALLA: That's correct.

12 THE COURT: -- because they would have been police
13 officers, presumably.

14 MR. CIMBALLA: Right. That is correct. With respect
15 to the bargaining agreement, this --

16 THE COURT: Let me ask you this, maybe I can focus our
17 discussion; specifically, what aspects of the collective
18 bargaining agreement as it presently exists, in your view,
19 does the Consent Decree collide with, if you will?

20 MR. CIMBALLA: Okay. To begin with, we have Article 4,
21 Section A, Subsection 2 dealing with the hours of work.
22 I've just taken the provision in pertinent part under
23 Subparagraph A that you see here.

24 Now, the bargaining agreement provides that the
25 officers work a somewhat rotation, and that rotation is

1 their schedule for one given month. If you read the
2 agreement here, if the Chief is under a circumstance where
3 he had an insufficient number of qualified volunteers to
4 work that one-month schedule for a second month, he may pick
5 and choose which officer will work that schedule for an
6 additional month -- the same schedule for an additional
7 month. This is done by seniority, the least senior officer
8 will be forced to work that schedule.

9 In addition in Article 6, Section C, Subsection 1
10 dealing with vacations, if -- if there's a minimum manpower
11 requirement in the bargaining unit and two officers picked
12 conflicting vacation schedules, the officer to actually get
13 that vacation schedule will be determined by seniority, once
14 again.

15 Article 6, Subsection D2, again, the officer --
16 officers are allowed to pick their vacation schedules and
17 the, I guess, procedure or format in which they pick their
18 schedules -- the order in which they pick their vacation
19 schedules is done by seniority. The most senior officer is
20 allowed to choose his vacation first and then it works down
21 the line to the least senior.

22 Article 7, Subsection A3, Subpart C dealing with light
23 duty, if an officer suffers an injury or illness related to
24 a work incident, he may be eligible for light duty. If
25 there are two officers that suffer a work-related injury and

1 there's only one position -- one light-duty position
2 available, the most senior officer will get that position.

3 Finally, Article 13, B6 Subpart A, in a situation in
4 which the City has to make a cutback in personnel, the
5 contract provides that layoffs will start with the last
6 officer hired. Those four parts of the bargaining agreement
7 are affected by the Consent Decree -- principally affected
8 by the Consent Decree.

9 THE COURT: Five parts. I think it's five parts; isn't
10 it?

11 MR. CIMBALLA: I'm sorry, five parts.

12 THE COURT: A through D.

13 MR. CIMBALLA: Yes. The FOP's consent is required
14 because it binds the union to a compromise which alters its
15 contractual rights. The FOP has a clear contractual right
16 in the present and current collective bargaining agreement
17 and that cannot be altered without the FOP's approval.

18 In addition, I think that there's a public policy
19 concern here. A hypothetical situation could be found in
20 the last provision that I referenced, Article 13, dealing
21 with layoffs. If the City should be forced to lay off
22 personnel, they would lay off the least senior person. If
23 an officer hired maybe three or four years ago is considered
24 less senior than one of the claimants because that claimant
25 may have taken the test in 1998, for example, the least

1 seniority officer, that officer has three or four years
2 experience, would be laid off before that rookie who might
3 not have any training. So as a matter of public policy
4 concern, we think that's another issue.

5 If you will allow us to, I would like to submit a brief
6 outlining our --

7 THE COURT: I won't allow that.

8 MR. CIMBALLA: Okay. That's all we have.

9 THE COURT: Thank you very much. I'll get you in
10 second.

11 MS. SEELEY: Your Honor, I would just like to preface
12 everything I say in this regard by pointing out that I hope
13 the Court is already aware that the United States is not
14 insensitive to the concerns of the incumbent police officers
15 or the union in negotiating one of these decrees. We
16 certainly did think about that and talked about it. We
17 understand what the issues are and we took care of what
18 seemed to be the most important issue at the time by
19 providing that retroactive seniority does not apply to
20 promotions so that someone is not going to be promoted who's
21 not qualified and not be promoted over other officers who
22 are qualified because of seniority.

23 But legally, the one thing that I heard said that is
24 simply incorrect as a matter of law is that the FOP's
25 consent is required for this Consent Decree, and it simply

1 is not. The Supreme Court had said that in a Title VII
2 case, retroactive seniority is a necessary component of
3 make-whole relief. So regardless of whether the union
4 agrees or objects, the Supreme Court had said that a Consent
5 Decree can provide, and should provide, retroactive
6 seniority.

7 At the same time, though, the concerns of the union and
8 of its members are relevant to whether the Decree is fair
9 and should be entered, and we think it is. The effects of
10 the retroactive seniority that may be provide under the
11 Decree are not unimportant, but they're fairly minimal. At
12 most, it will go to five priority hires. The furthest back
13 it can possibly go is to March 1997. And it's normal in
14 these kind of cases that, in fact, the people who are still
15 seeking hire in a job like this, are the ones who applied
16 most recently. So it's possibly that all priority hires
17 would come from the 2002 list and there would be even less
18 retroactive seniority awarded.

19 Other than that, I would just reiterate that this is --
20 the Supreme Court has said that there is always a balance
21 that has to be struck in a Title VII case providing the most
22 make-whole relief possible, it's very important.

23 THE COURT: Let me ask you to come back up to the
24 podium just for a second, if you would. And I apologize,
25 would you give me your name again, there's been so many

1 people coming up and down.

2 MR. CIMBALLA: Chris Cimballa.

3 THE COURT: Mr. Cimballa, do you disagree with the
4 Government's position, which is supported by Supreme Court
5 law, that Title VII in the context of a Consent Decree
6 trumps collective bargaining agreements?

7 MR. CIMBALLA: It's my understanding that Title VII
8 trumps collective bargaining agreements where those parties
9 whom were discriminated against were originally parties to
10 the collective bargaining agreement. I could be wrong, but
11 that was my understanding of the law.

12 THE COURT: Well, everybody could be wrong on
13 something. I think you are, but fundamentally, I want to
14 make sure I have your major point. Your major point is, if
15 I take it right, that the terms and conditions of the
16 Consent Decree insofar as it affects members of the
17 bargaining unit, should not be implemented because the
18 members of the bargaining unit had no input into the Consent
19 Decree; is that essentially it?

20 MR. CIMBALLA: That is correct, Your Honor.

21 THE COURT: Does the City have anything they want to
22 say on this point?

23 MR. VILLELLA: Yes. Just in general, in terms of a
24 response to the FOP and to the individual officers, the
25 concerns they've raised, those officers and the FOP assisted

1 with the defense of this case in the liability phase. We
2 certainly have expressed thanks to them before, we're very
3 grateful that they cooperated with this and we presented the
4 case the best we could. The Court ruled in the United
5 States' favor. And initially I thought that judgment,
6 itself, was immediately appealable to the 3rd Circuit. Upon
7 further research we determined that it was not, we'd have to
8 wait for the damages phase to be completed.

9 And in that scenario, the Court encouraged settlement,
10 made itself available --

11 THE COURT: But to the point that they're making about
12 the Title VII insofar as it conflicts with collective
13 bargaining agreements, et cetera.

14 MR. VILLELLA: Well, the Consent Decree would, of
15 course, be a determination of this Court, that would be the
16 only place that someone challenging it could go, and that
17 would be -- and I think that would outweigh the collecting
18 bargaining interest that they're raising. That's our
19 impression when we signed onto it, we realize that there are
20 individual arguments that could made to the contrary.

21 The impact that the officers are concerned about would
22 deal with the possibility, the potential, that someone would
23 be hired as one of the priority hires that were calculated.
24 First of all, the number of five that was calculated, I
25 think, was extrapolated -- was in my mind a good

1 extrapolation of what we had -- of what real evidence we had
2 from the 2002 test, which we determined that there was
3 perhaps one female officer who had passed the written test,
4 which was given before the physical test, had a high enough
5 score that she may well have been hired had she not failed
6 the physical agility test that year.

7 So extrapolating that over the four administrations of
8 the test when the prior administrations had a lot more
9 female failed applicants, the number five seemed to be a
10 fair number of the potential lost female hires.

11 Now, we'll address it again, and it's been addressed
12 before, no one of these five priority hires is going to be
13 hired unless they are currently able to be police officers.
14 They must pass the physical testing that is now done. They
15 must pass the Civil Service, must pass psychological and the
16 background check. So -- and the potential remains that no
17 one would be hired from this list of priority hires.

18 So if they're thinking that the impact is that five
19 people are going to come on tomorrow and have five or 10
20 years of seniority and have all these rights over and above
21 current officers, that's just not going to happen. No one
22 is going to be a police officer in the City of Erie unless
23 they are currently able to be a police officer. And the
24 only advantage of being on this priority hire list is that
25 you're going to be selected to come -- to come in first

1 without, perhaps, going through the regular process of
2 applying. You're still doing to have to pass the test and
3 do everything else that's necessary.

4 And I think that's all we can really say, Your Honor.

5 THE COURT: All right. Thank you, Mr. Villella. Now,
6 is there anyone else here who both filed written objections
7 and requested to speak? Did you file written objections,
8 ma'am?

9 MS. BOOTH: Yes, I did.

10 THE COURT: What is your name?

11 MS. BOOTH: Frances Booth.

12 THE COURT: Why don't you come up here, I couldn't
13 catch that.

14 MS. BOOTH: My name is Frances Booth.

15 THE COURT: Could you spell it.

16 MS. BOOTH: B-O-O-T-H.

17 THE COURT: Kathy, do we have that one somewhere here?
18 I don't have you down here. We have no written objection
19 filed by you. Does the United States? I want to make sure
20 that I just didn't miss it.

21 MS. SEELEY: Your Honor, we do not -- we did not
22 receive a written objection. Ms. Brown, our paralegal,
23 tells me that she has spoken with Ms. Booth on the phone,
24 but we never received an objection.

25 THE COURT: Did you file a written objection?

1 MS. BOOTH: Yes, sir. I brought one down here on May
2 the 4th because I was out of town and I didn't get into
3 Pennsylvania until the 29th and that was a Saturday.

4 THE COURT: I'm just trying to figure out where it is.
5 Who did you drop it off with?

6 MS. BOOTH: I brought it to that office where I picked
7 up my copy, and the lady in there told me --

8 THE COURT: Where you picked up your what?

9 MS. BOOTH: A copy of everything, the list, everything
10 that was taking place from the previous hearings.

11 THE COURT: Were those being distributed at the City of
12 Erie?

13 MS. BOOTH: Yes. Whatever office that is -- 104, Room
14 104.

15 THE COURT: Do you have something from --

16 MR. VILLELLA: I don't remember her name. It would
17 take a few minutes for us to look to see in the system.

18 THE COURT: Let's do it this way -- let's, first of
19 all, swear you in.

20

21 F R A N C E S B O O T H, first having
22 been duly sworn, testified as follows:

23

24 THE COURT: Before we get started here, now that you've
25 been sworn, let me ask you, are you absolutely certain that

1 you filled out -- Kathy, show her one of these forms so she
2 can refresh her recollection -- that you filled out one of
3 those forms and timely submitted it?

4 MS. BOOTH: Yes, sir. That was stapled onto one of the
5 packets that they had gave me. And they told me to take it
6 out and bring it back in.

7 THE COURT: All right. Given the fact that any piece
8 of paper in this world is capable of being misplaced or
9 lost, I will take you at your word that you filed an
10 objection and hear what you have to say.

11 MS. BOOTH: The reason why I did file the objection was
12 because I did take the agility test and I did take the Civil
13 Service test in 2002. At the time my name was Frances
14 Greene, I was married two and half months ago and I changed
15 it to Frances Booth.

16 THE COURT: At the time you took the test it was
17 Greene?

18 MS. BOOTH: Yes, sir.

19 THE COURT: When did you take it the test?

20 MS. BOOTH: I took it in 2002. And as I went over the
21 list, I noticed there were women on that list that I
22 actually did take the test with. And so when I called the
23 litigation office -- that's how I ended up with all my
24 information because the lady said that I was on a list
25 there, but I was not on a list that was printed out here.

1 And I know two other women that's not on that list that also
2 took that test with me.

3 THE COURT: So let me make sure I understand what your
4 concern is. Your concern is you took the test in 2002, but
5 you do not appear on the list of eligibles -- potential
6 eligibles in the court papers; is that right?

7 MS. BOOTH: Exactly.

8 THE COURT: So you are in the -- you feel you're in the
9 same situation as Ethel Easter; is that right?

10 MS. BOOTH: Yes, sir.

11 THE COURT: Do you have any paperwork or documentation
12 that would reflect that you took the test?

13 MS. BOOTH: No. But I can get that because I did not
14 know that I had to bring that here today. I was waiting to
15 hear back and I thought someone would, like, reply back to
16 me regarding my objections of what I should and should not
17 bring. But I do have where I spoke with Jackie -- I know
18 her as Jackie Radcliff because I cannot pronounce her
19 married name.

20 THE COURT: Well, that's all right, but who is she?

21 MS. BOOTH: She used to be a police detective here.
22 She was a black police woman. I understand that she's no
23 longer with the Police Department, she retired from what I
24 was told.

25 THE COURT: Was she there when you took the test?

1 MS. BOOTH: She's the one that gave me all the
2 information to get me to the test. She gave me my
3 application when I came down here and did everything.

4 THE COURT: All right.

5 MS. BOOTH: She was my information source, basically.

6 THE COURT: I understand.

7 MS. BOOTH: Thank you, sir.

8 THE COURT: Ms. Seeley, I propose to do the same thing
9 with Ms. Greene that we're going to do with Ms. Easter,
10 which is conditionally putting her on the list subject to
11 both of those individuals proving that up at the time of any
12 individualized fairness hearing.

13 MS. SEELEY: Certainly, Your Honor. No objection to
14 that.

15 THE COURT: Is there anybody else, then, who submitted
16 a written objection along with a request to speak that I
17 have inadvertently overlooked? All right. I'm going to
18 take a short recess and I'm going to come out and -- come
19 out then and rule on this. All right.

20

21 (Recess taken from 10:22 a.m. to. 10:35 a.m.)

22

23

24

25

O R D E R O F C O U R T

THE COURT: Please be seated. This is going to be an order. If I go too fast for you, let me know.

By the way of background, this action, brought by the United States under Section 707 of Title VII of the Civil Rights Act of 1964, arises from allegations that The City of Erie violated Title VII since at least 1996 by utilizing a physical test, herein after referred to as a PAT test, to screen applicants for employment as entry-level police officers. It has been the United States' contention that the PAT, as used by the City, disproportionately excluded females from consideration for hire and that PAT was neither "job related" for the position of entry-level police officer nor "consistent with business necessity." These proceedings were then bifurcated into two phases, the first being the liability phase and the second being the relief phase.

On October 8th, 2004, we found that the United States had successfully established a prima facie case of discrimination by demonstrating that the City's use of the PAT disparately impacted female applicants. It then became the City's burden to prove that the PAT was both "job related" and "consistent with business necessity", as required under 42 U.S.C. Section 2000e-2(k)(1)(A)(i). That

1 matter was then tried before this Court from March 7th
2 through March 10, 2005. And on December 13, 2005, this
3 Court issued Findings of Fact and Conclusions of Law in
4 which we ruled that the City had failed to prove by a
5 preponderance of the evidence that the PAT as utilized was
6 both job related and consistent with business necessity. We
7 therefore concluded that the City's use of the PAT violated
8 Title VII and judgment was entered in favor of the United
9 States as to the liability phase.

10 Before engaging in relief-phase discovery, the
11 parties negotiated the terms of the instant Consent Decree.
12 On March 10, 2006, this Court provisionally approved the
13 Decree, subject to this hearing, the purpose of which is to
14 consider the fairness of the Decree's terms in light of any
15 potential objections. To that end, notice of these
16 proceedings was previously sent to all potential claimants
17 and to incumbent City police officers. In addition, notice
18 was published in the Erie Times-News. To date, some 55
19 objections and comments have been submitted to the Court,
20 which we will discuss in further detail below.

21 As an initial matter, I touched briefly on the
22 applicable, legal standard governing the approval of a
23 Consent Decree in a Title VII case. "Congress enacted Title
24 VII ... to assure equality of employment opportunities by
25 eliminating those practices and devices that discriminate on

1 the basis of race, color, religion, sex, or national
2 origin." Alexander versus Gardner-Denver Co., 415 U.S. 36,
3 44 (1974). "In enacting Title VII, Congress expressed a
4 strong preference for encouraging voluntary settlement of
5 employment discrimination claims." Carson versus American
6 Brands, Inc., 450 U.S. 79, 88 n. 14 (1981).

7 Because of this long-recognized preference for
8 settlement of employment discrimination claims, courts have
9 adopted a deferential toward consent agreements in Title
10 VII. See United States versus City of Miami, 614 F.2d 1322,
11 1332-33 (5th Cir. 1980); United States versus New Jersey,
12 1995 WL 1943013 at Page 10 (D.N.J. Mar. 14, 1995).

13 Accordingly then, our role in a fairness hearing such as
14 this is limited to determining whether the "settlement is
15 fair, adequate, and reasonable." United States versus New
16 Jersey. A consent decree negotiated in a Title VII action
17 "carries with it the presumption of validity that is
18 overcome only if the decree contains provisions which are
19 unreasonable, illegal, unconstitutional, or against public
20 policy." United States versus City of Alexandria, 614, F.2d
21 1358, 1361 (5th Cir. 1980).

22 We begin now by reviewing, first, the salient
23 provision of the Consent Decree.

24 First, the Consent Decree bars the City from
25 future use of the PAT or any other physical ability test

1 that would violate Title VII relative to the selection of
2 entry-level police officers. To ensure this protection, the
3 City is required to obtain the agreement of the United
4 States or the approval of this Court if it wishes to utilize
5 any physical ability test to screen applicants for
6 entry-level police officer positions, other than the test
7 used to determine eligibility for entry into the police
8 academy (which test is also currently used by the City).
9 Given our finding of liability on the part of the City, an
10 award of prospective injunctive relief is appropriate. See
11 International Brotherhood of Teamsters versus United States,
12 431 U.S. 324, (1977). While this provision bars further use
13 of the unlawful PAT, it allows continued use of the physical
14 standards currently employed by the City and provides a
15 mechanism whereby the City can develop new physical agility
16 test standards in the future consistent with Title VII's
17 mandates. Having reviewed the responses submitted in
18 connection with this hearing, we perceive no serious
19 objections to this aspect of relief.

20 Second, the Consent Decree contains provisions
21 allowing for individual remedial relief, including monetary
22 relief, and for some potential claimants, remedial hiring
23 coupled with an award of retroactive seniority.
24 Specifically, the Consent Decree provides that the City will
25 pay a total of \$170,000 in four installments to be

1 distributed among eligible claimants using a "shortfall/pro
2 rata" procedure. This calls for a calculation of the number
3 of female entry-level police officers the City would have
4 been expected to hire on a statistical basis absent its use
5 of the PAT. That anticipated number minus the actual number
6 of female hires constitutes the "shortfall". Otherwise
7 stated, the "shortfall" is the number of entry-level police
8 officer jobs presumptively denied the female applicants
9 because of the City discriminatory conduct. Once the
10 shortfall is determined, the amount of wages those workers
11 would presumably have earned is calculated and the total
12 fund is then distributed on a pro-rata basis among the
13 claimants. See EEOC versus Chicago Miniature Lamp Works,
14 640 F. Supp. 1291, 1298 (N.D. Ill. 1986). See also United
15 States versus State of New Jersey, *supra*, at Page No. 5. In
16 this case, the City estimates that it would have hired no
17 more than three additional female police officers in the
18 absence of the PAT, while the United States estimates that
19 it would have been 7 to 10 additional female hires. The
20 amount of monetary relief was based upon a compromise
21 shortfall of 5 additional hires.

22 Based upon this same presumed hiring shortfall,
23 the Consent Decree provides that the City will hire up to,
24 but no more than, 5 qualified claimants for the police
25 officer position before hiring other new entry-level police

1 officers. Several points need to be emphasized here.
2 First, under the terms of the Consent Decree, the City is
3 not required to make any priority hires until after it has
4 recalled all of those incumbent officers previously laid off
5 as a result of the City's recent budget difficulties. Thus,
6 officers currently laid off are entitled to the first job
7 openings. Second, only persons who are otherwise qualified
8 for hire at the time they failed the PAT and who presently
9 qualify for the position will be eligible for priority
10 hiring relief. The City will have an opportunity to
11 challenge the qualifications of any claimant requesting
12 hiring relief and, at a second hearing to be held at a
13 subsequent date, this Court will make a determination as to
14 whether any particular individual is eligible for hiring
15 relief. Thus, the Consent Decree does not require the City
16 to hire any unqualified individual. Third, the Consent
17 Decree recognizes the possibility that, ultimately, there
18 may be fewer than 5 claimants who express any interest in a
19 priority hiring and who are found to be currently qualified
20 for such relief. In that event, the City will be required
21 to hire only those claimants, if any, who are found to be
22 currently qualified for the position in question. Again,
23 the terms of the Consent Decree will not require the City to
24 hire 5 females if fewer than 5 are found to be currently
25 qualified for the job or if fewer than 5 express an interest

1 in being hired.

2 Finally, the Consent Decree provides that
3 claimants hired as priority hires will be awarded
4 retroactive seniority upon completion of their probationary
5 period. However, such retroactive seniority will not be
6 used for purposes of determining pension benefits nor will
7 it be used to determine an individual's eligibility for
8 promotion. In this fashion, the Decree ensures that an
9 award of retroactive seniority will not result in the
10 advancement of any priority hire into a position for which
11 she does not have the required experience.

12 To ensure that Title VII's purposes are fully
13 realized, "Congress provided the courts with great
14 discretion in designing remedial relief and granted them the
15 full equitable powers necessary to implement that relief."
16 *United States versus State of New Jersey supra*, at Page 19.
17 In assessing the appropriateness of the Consent Decree's
18 terms of relief, we are guided by the principle that "the
19 injured party is to be placed, as near as may be, in the
20 situation he would have occupied if the wrong had not been
21 committed." *Albemarle Paper Co.*, 422 U.S. at 418-19. Thus,
22 courts have employed a wide range of equitable remedies,
23 including reinstatement or hiring of employees, with or
24 without back pay, and awards of retroactive seniority. See
25 *Franks*, 424 U.S. at 763-65.

1 As noted, it is the Court's function to determine
2 whether the Consent Decree is fair, adequate, reasonable,
3 lawful, and consistent with the public interest. To inform
4 our assessment under this standard, we consider several
5 facts borrowed from the class action settlement context, as
6 set forth by the 3rd Circuit in *Girsh v. Jepson*, 521 F.2d
7 153, 157 (3d Cir. 1975) - namely:

8 (1) the complexity, expense and likely duration of
9 the litigation...; (2) the reaction of the class to the
10 settlement...; (3) the stage of the proceedings and the
11 amount of discovery completed...; (4) the risks of
12 establishing liability...; (5) the risks of establishing
13 damages...; (6) the risks of maintaining the class action
14 through trial...; (7) the ability of the defendants to
15 withstand a greater judgment...; (8) the range of
16 reasonableness of the settlement fund in light of the best
17 possible recovery...; (9) the range of reasonableness of the
18 settlement fund to a possible recovery in light of all the
19 attendant risks of litigation...

20 Other courts have considered additional factors
21 such as the presence of collusion, the opinion of competent
22 counsel, and the presence of a governmental participant.
23 See *United States versus State of New Jersey*, at Page 11.

24 In this case, turning to the first factor, though
25 the relevant issues have been straightforward in a legal

1 sense, the case has been factually complex and heavily
2 dependent upon evidence from expert witnesses. Trial of the
3 liability phase included testimony from four different
4 experts in such fields (among others) as exercise physiology
5 and physical testing, industrial/organizational psychology
6 and employment test validation. Because of the necessary
7 involvement of various experts, these proceedings have been
8 costly thus far. Were litigation to proceed to the damages
9 phase, expert testimony would again be required, thus
10 further adding to the parties' already significant expenses.
11 The case is already approximately two and a half years old
12 and a resolution of the damage phase would likely take many
13 months, if not a year or more, to resolve, since the parties
14 have not yet embarked on damage-related discovery, and since
15 litigation of damage-related issues would likely involve
16 individualized challenges relative to various claimants
17 entitlement to relief. If one of the parties were to file
18 an appeal, this would only add to the expense and duration
19 of litigation. Therefore, on balance, this factor favors an
20 approval of the Consent Decree.

21 With respect to the reaction of the class of this
22 settlement, the United States has prosecuted this action on
23 behalf of approximately 90 potential claimants, all of them
24 being females who applied for the position of entry-level
25 police officer with the City of Erie between January 1, 1996

1 and December 31, 2002 and who failed the PAT during that
2 time span. Of the potential claimants only three have
3 submitted comments or objections relative to the Consent
4 Decree and, in addition, two individuals have asserted that
5 they were wrongly excluding from the list of potential
6 claimants. Based on a general lack of objection from the
7 potential claimants, this factor favors approval of the
8 Consent Decree.

9 With respect to the stage of the proceeding, as of
10 this date, substantial litigation has occurred. The
11 liability phase of the case has already been decided
12 adversely to the City. Significant discovery relative to
13 the damage phase has not yet been undertaken but the
14 parties, through the course of extensive settlement
15 negotiations have had an opportunity to develop their
16 respective theories on the damage issue. The current stage
17 of the proceedings and discovery completed thus far both
18 favor approval of the settlement.

19 As noted, the City's liability through its use of
20 PAT between 1996 and 2002 has already been established
21 following a nonjury trial before the Court. Although the
22 City may yet have the right to appeal that ruling, in this
23 Court's view, it is unlikely that the liability judgment
24 would be overturned on appeal. That is because the Court's
25 liability determination was heavily dependent upon factual

1 findings and turned in large part on the Court's evaluation
2 of the credibility of competing expert witnesses - issues
3 which would be reviewed on appeal under a deferential
4 standard. Therefore, the City's adverse liability judgment
5 is a factor which should support the City's interest in a
6 consensual settlement.

7 With respect to the risk of establishing damages,
8 while the City's liability for its use of the PAT has
9 already been determined, the Court acknowledges that the
10 likely outcome relative to the potential damages in this
11 case is as yet undetermined and harder to predict. In fact,
12 the United States acknowledges that it is impossible to
13 determine with any certain which claimants would have been
14 hired but for the City's use of the PAT. This is due both
15 to the passage of time (in some cases up to 10 years) since
16 the discrimination occurred and also to the fact that those
17 who failed the PAT were not permitted to proceed further in
18 the application process. As one objector has noted,
19 multiple steps are involved in the City's selection of new
20 police officers: Applicants must pass a written exam, which
21 involves the adjustments of test scores to account for
22 veteran's preference points; the best scoring candidates are
23 also subjected to an in-depth background, a medical exam, a
24 psychological exam, and a lie detector test. Selected
25 candidates are sent to the Pennsylvania Police Academy for

1 Act 120 certification, which in turn involves five and a
2 half months of academic and physical training. Thus, as to
3 any particular claimant in this case, it may be unclear
4 whether, for example, the individual would have successfully
5 completed the written exam or passed the required
6 psychological background check.

7 Nevertheless, the impossibility of pinpointing
8 which claimants would have been hired in the absence of the
9 PAT does not defeat the United States' claim for damages.
10 Instead courts have held that, where discrimination has been
11 established but it is not possible to determine with
12 reasonable certainty which claimants would have been hired
13 absent the unlawful practice is appropriate to use a
14 "shortfall" method to calculate monetary relief. See
15 Chicago Miniature, 640 F. Supp. at 1298-1300. Here, the
16 total amount of monetary relief offered under the Consent
17 Decree is the result of the parties' compromised presumption
18 that as many as five additional females would have been
19 hired by the City between 1996 and 2002 in not for the
20 City's use of the PAT. This estimate accounts for the fact
21 that not all women who failed the PAT during the years in
22 question would have successfully completed the other steps
23 in the selection process. It also reflects the anticipated
24 effect that veterans preference points would have had on the
25 expected number of women hired.

1 The total amount of monetary relief to be paid
2 under the Consent Decree (\$170,000) is based on an estimate
3 of the amount that would have been earned by five
4 entry-level police officers if they had been hired from 1996
5 through 2002 eligible list, less an estimate of the amount
6 they would have earned in mitigation. As the United States
7 explained, even if we could determine that an individual
8 claimant would have been hired and earned \$30,000 per year
9 as a City police officer, if she had earned \$25,000 per year
10 in another job, she would be entitled to recover only
11 difference (\$5,000 per year) rather than the full \$30,000.
12 Here, the parties have agreed to a monetary award of
13 \$170,000, representing an average of \$34,000 for each of the
14 five shortfall positions.

15 With respect of the ability defendant to withstand
16 a greater judgment, though we have acknowledged that the
17 issues and proof relative to establishing damages is less
18 well-defined than that with respect to the liability, still
19 the City's precarious financial situation must be factored
20 into our analysis. The City's contribution under the
21 Consent Decree of \$170,000 toward a monetary relief award
22 already represents a significant financial hardship. It is
23 highly doubtful that the City could withstand a greater
24 judgment in the event that the United States was successful
25 in its damage case. As we discuss below, it is the position

1 of the United States that as many as 7 to 10 female
2 applicants would have been hired by the City as entry-level
3 police officers if not for the PAT. Should the United
4 States prevail on this issue, the costs of the City in terms
5 of backpay and full-blown retroactive benefits would be
6 significantly greater. Accordingly, because the City is not
7 without risk in defending the damages portion of this case,
8 and because the City likely be unable to withstand a
9 judgment greater than the amount paid out under the Consent
10 Decree, this factor weighs in favor of approving the
11 settlement.

12 Finally, I note that there has been no evidence of
13 collusion in connection with the Consent Decree. It is
14 supported by the opinion of competent counsel and the
15 presence of a governmental participant all weigh in favor
16 approval of the Consent Decree. See *Officers for Justice*,
17 688 F.2d at 625.

18 I now turn to the specific objections that have
19 been filed to the Consent Decree. To date, some 61
20 responses to the Consent Decree have been filed by various
21 persons or organizations, including 55 incumbent police
22 officers, the Fraternal Order of Police No. 7, "FOP", the
23 Police Relief and Pension Association of Erie, Pennsylvania,
24 and several potential claimants. We note that of the 55
25 objections filed by incumbent police officers, 50 were

1 identical to those submitted by the Fraternal Order of
2 Police No. 7. Thus, in all, 11 distinct responses have been
3 received. We agree with the Plaintiff that the comments and
4 objections set forth in these responses generally fall into
5 1 of 10 categories, which I will now discuss in turn.

6 Some of the objectors have expressed disagreement
7 with this lawsuit in principle, objecting to the Justice
8 Department's decision to prosecute the employment
9 discrimination claims in the first place and disputing the
10 merits of this Court's previous liability judgment.
11 Objections have been raised to the effect that, for example,
12 there is no federally "right" to employment as a City of
13 Erie police officer; the Court erred in finding that the
14 challenged PAT was "not job related and consistent with
15 business necessity;" the courts should not been involved in
16 matters affecting the standards of this job; the Court
17 failed to recognize that some woman who took the PAT
18 actually passed it; and, by virtue of the Court's judgment,
19 all persons who failed the PAT, for whatever reason, can now
20 raise employment discrimination claims.

21 The short answer to these objections is that they
22 are irrelevant for present purposes because the purpose of
23 today's hearing is not to debate the wisdom of Congress'
24 mandate as set forth in Title VII. Nor is it the purpose of
25 today's hearing to relitigate the merits of the government's

1 disparate impact claim. The claim was already fully
2 litigated during the course of a 4-day bench trial, which
3 resulted in this Court's issuance of a 73-page Findings of
4 Fact and Conclusions of Law. This Court's liability
5 judgment stands. And the purpose of our business today is
6 to determine whether in light of that ruling as it presently
7 stands the terms of settlement as set forth in the Consent
8 Decree are lawful, fair, reasonable, adequate, and
9 consistent with public interest.

10 In any event, the Court has duly considered the
11 objections raised in relative to the merits of the
12 underlying liability judgment and finds no basis therein for
13 rejecting the Consent Decree.

14 Some comments suggest that the Consent Decree is
15 unfair to people who passed the PAT but did not get hired
16 because of other reasons, such as not scoring high enough on
17 the written exam. As to this objection, the United States
18 correctly observes that it was the PAT, and only the PAT,
19 which was alleged and found to have an unlawful
20 discriminatory impact under Title VII. No other employment
21 practice utilized by the City was challenged by the United
22 States or found to be unlawful. Accordingly, the group of
23 individuals potentially entitled to relief under the Consent
24 Decree is appropriately limited to those harmed by the PAT.

25 One potential claimant objects that the amount of

1 monetary relief available under the Consent Decree is
2 insufficient because that amount is less than what she
3 estimates she would have earned if she had been hired by the
4 City. However, as the court in the United States versus
5 State of New Jersey recognized, it is important to note that
6 the United States' role as Plaintiff in this action:

7 The United States represents the interest of all
8 citizens, including, but not limited to those women ... who
9 were denied employment opportunities as a result of the ...
10 discriminatory hiring practices engaged in by the
11 (Defendant)...

12 The United States must seek to obtain justice for
13 as many victims as possible while balancing its limited
14 resources. As the Third Circuit observed:

15 The Attorney General's prosecution of a (Title
16 VII) suit is governed by desire to achieve broad public
17 goals and the need to harmonize public policies that may be
18 in conflict; practical considerations, such as where limited
19 public resources can be concentrated most effectively may
20 dictate conduct of a suit inimical to the immediate
21 interests of the dsicriminatee, who presumably seeks full
22 satisfaction of his individual claim regardless of the
23 effect on other cases.

24 Bryan versus Pittsburgh Place Glass Co., 494 F.2d
25 799, 803 (3d Cir. 1974)... While the United States may seek

1 to compensate individuals believed to be victims of
2 discrimination, it also seeks to protect public rights,
3 which may conflict at times with the interest of
4 individuals.

5 Therefore, the United States' decision to settle
6 its claim through a Consent Decree cannot be evaluated
7 solely in terms of the remedies that it provides to those
8 persons subject to allegedly illegal discrimination, but
9 rather, must be considered in light of the public policy or
10 eradicating noncompliance with Title VII and furthering its
11 purpose of providing equal employment opportunity for all.

12 In sum then, one claimant's dissatisfaction with
13 the amount of the proffered monetary award is not
14 dispositive as to the adequacy of the settlement and does
15 not control my analysis for purposes of this hearing.

16 Moreover, when the monetary recovery is considered
17 on its merits, this Court finds the amount of the award to
18 be adequate, fair, and reasonable under the circumstances.
19 As previously explained, the total amount of monetary relief
20 offered under this Consent Decree is the result of the
21 parties' compromised presumption that as many as five
22 additional females would have been hired by the City between
23 1996 and 2002 if not for the City's use of the PAT. The
24 \$170,000 recovery fund is based on an estimate of the amount
25 that would have been earned by those five female entry-level

1 police officers if they had been hired from 1996 through
2 2002 eligible lists, less an estimate of the amount they
3 would have earned in mitigation. Title VII requires that
4 amounts earned in mitigation or could have been earned using
5 reasonable diligence should be subtracted from the amount of
6 backpay to be awarded to victims of discrimination. I find
7 that the use of a five-person shortfall is reasonable in
8 light of the parties' competing estimations with respect to
9 damages. Further, I find that basing an award on an assumed
10 recovery of \$34,000 for each shortfall position is
11 reasonable and appropriate to account for mitigation damages
12 as required by Title VII.

13 I also find that it is fair to require the
14 \$170,000 monetary award to be divided among all eligible
15 claimants. I note that each claimant's share of the
16 monetary award will be determined after this Decree is
17 entered and the potential claimant's have been given an
18 opportunity to make a claim for monetary and/or hiring
19 relief. Any objections to the shares allotted to each
20 claimant will be taken up by this Court in a second fairness
21 hearing to be held at a later time. If it were
22 theoretically possible to determine with certainty whether a
23 particular applicants who failed the PAT would have passed
24 all the other steps in the City's selection process and been
25 hired, then only those applicants who would have actually

1 been hired would be eligible for monetary relief as we
2 previously observed, however, it is impossible in retrospect
3 to make such a determination because of the fact that the
4 City did not allow individuals who failed the PAT to
5 continue on in the selection process. Under the
6 circumstances, then, it is appropriate to allow all eligible
7 claimants to have a "pro rata" share in the monetary award
8 even though each claimants' award may wind up being
9 substantially less than the full value of the police officer
10 job she might have obtained in the absence of the PAT.
11 Courts have recognized that, in circumstances such as these,
12 that a "pro rata" approach is "the best that can be done"
13 for the claimants. See Chicago Miniature, 640 F. Supp. at
14 an 298-1300; EEOC versus Andrew Corp., 1990 WL 92820 at Page
15 2 (N.D. Ill. June 26, 1990).

16 Certain objectors incumbent City police officers,
17 insist that it is unfair to allow all women who failed the
18 PAT to be eligible for relief because even if they had
19 passed the PAT, it is not clear they would have been hired.
20 I do not find this objection meritorious. First, to
21 reiterate, the total amount of monetary relief offered under
22 the Consent Decree is premised upon the parties' compromise
23 assumption that as many as five additional females would
24 have been hired by the City between 1996 and 2002 if not for
25 the use of PAT. This estimate by its very nature sets a cap

1 on damages and accounts for the fact that not all woman who
2 failed the PAT during the years in question would have
3 successfully completed the other steps in the selection
4 process. Second, not all females who failed the PAT will
5 ultimately partake of the settlements proceeds. Only those
6 who make a claim for monetary relief and who are judged to
7 be eligible for relief will have the right to a pro-rata
8 share. Disputes, if any, concerning an individual
9 claimant's entitlement to relief, as I said, will be taken
10 up by this Court at a second fairness hearing, if necessary,
11 down the road.

12 Under the terms of the Consent Decree, claimants
13 who are otherwise eligible for hiring relief are not deemed
14 currently unqualified because they presently lack Act 120
15 certification. One objector suggests that this aspect of
16 the Decree may result in the City hiring individuals who are
17 unqualified for the entry police officer job. We disagree.
18 First, because of the Act 120 certification was not a
19 prerequisite for applicants (and incumbents) hired from 1996
20 to 2002 eligibility list at issue, it would be inappropriate
21 to impose that as a prerequisite for the claimants here who
22 otherwise qualify for hiring relief. Second, under the
23 Consent Decree, the City may determine that a claimant is
24 currently unqualified and, thus, not entitled to hiring
25 relief, if the claimant fails the MPOETC physical ability

1 test used to determine entry into the police academy.
2 Third, claimants hired under the Decree, like other hired
3 from 1996 to 2002 eligibility list, will be required the
4 successfully complete the police academy and become
5 certified law enforcement officers once they are hired.

6 A number of objectors have expressed the concern
7 that the retroactive seniority provisions of the Consent
8 Decree will unfairly disadvantage innocent incumbent
9 officers. The United States acknowledges that it is
10 possible that the awarding of retroactive seniority may
11 place some incumbents lower in the seniority ranks than they
12 would have been if the PAT had never been utilized.
13 Nevertheless, this particular objection does not, in my
14 view, undermine the overall fairness and reasonableness of
15 the settlement.

16 First, awards of retroactive seniority have
17 repeatedly been upheld as an appropriate Title VII remedy
18 and essential to the statute's "make whole" objectives. See
19 Franks, 424 U.S. at 774-75. Indeed, the Supreme Court has
20 admonished that "without an award of seniority dating from
21 the time when he or she was discriminatorily refused
22 employment, an individual who applies for and obtains
23 employment ... pursuant to the District Court's order will
24 never obtain his rightful place in the hierarchy of
25 seniority according to which these various employment

1 benefits are distributed." Franks, 424 U.S. at 767-68.

2 . Still, in assessing whether an award of
3 seniority relief is fair and workable, courts consider such
4 factors as the number of victims of unlawful discrimination,
5 the size of the incumbent workforce that will be affected,
6 and the impact granting seniority relief will have on the
7 incumbent workforce. United States versus State of New
8 Jersey supra, at 21. Here, no more than five qualified
9 claimants will receive hiring relief and retroactive
10 seniority. Amongst the approximately 200 sworn police
11 officers in the Erie Police Department, the impact of the
12 proposed grants of retroactive seniority will be fairly
13 minimal. This is especially true because the earliest
14 possible retroactive seniority date is 1997; in reality, it
15 is probable that the earliest actual retroactive dates will
16 be later than 1997, because one would expect that the
17 potential claimants most interested in pursuing hiring
18 relief would be those who had applied with the City most
19 recently and who would have had less time to integrate
20 elsewhere into the workforce. This means that all incumbent
21 officers hired prior to 1997, or whatever the earliest
22 retroactive date is, will not be affected at all by the
23 retroactive seniority provision. Moreover, the terms of the
24 Consent Decree specifically provide that grants of
25 retroactive seniority for the priority hires cannot be used

1 either to determine promotions or to determine pension
2 benefits. And, to reiterate, it is possible under the terms
3 of the Consent Decree that the number of priority hires and
4 corresponding awards of retroactive seniority will
5 ultimately be fewer than five, thereby further lessening the
6 impact on incumbents. Notably, none of the objectors have
7 demonstrated that the award of retroactive seniority as
8 contemplated in the Consent Decree will, in fact, infringe
9 on their seniority rights.

10 In sum, the award of retroactive seniority as
11 proposed in the Consent Decree is designed to minimize, as
12 far as practicable, any unfair prejudice to the rights of
13 the incumbent police officers. The seniority rights of
14 incumbents are disrupted only to the limited extent
15 necessary to achieve "make whole" relief for the eligible
16 claimants. I therefore conclude that this aspect of the
17 Consent Decree is fair, workable, and reasonable.

18 Both the FOP and numerous incumbent officers have
19 objected that the application of retroactive seniority for
20 purposes of anything other than wages will violate the
21 collective bargaining agreement between the City and the
22 FOP. However, in *Zipes versus Trans World Airlines*, 455
23 U.S. 385 (1982), the Supreme Court held that, upon a finding
24 of discrimination by an employer, an award of retroactive
25 seniority is appropriate even if it would violate a

1 collective bargaining agreement between the employer and an
2 innocent union. 455 U.S. at 400. See Independent
3 Federation of Flight Attendants versus Zipes, 491 U.S.
4 754,757 (1989); General Building Contractors versus
5 Pennsylvania, 458 U.S. and 75, 404-05 (1982).

6 In addition, the FOP and numerous police officers
7 object that the use of the retroactive seniority will
8 violate state civil service statutes. However, under the
9 principles of the Supremacy Clause of the United States
10 Constitution, Title VII trumps any state civil service law
11 that conflicts with its provisions or which "stands as an
12 obstacle to the accomplishments of the full purposes and
13 objectives of Congress." Lawrence County versus
14 Lead-Deadwood School District, 469 U.S. 256, 260 (1985).
15 Thus, state statutes and civil service rules cannot prevent
16 the award of appropriate relief to victims of employment
17 discrimination. See Kirkland versus New York State
18 Department of Corrections, 711 F.2d 1117, (2d Cir. 1983).

19 Accordingly, I find that those objections lack
20 merit.

21 Similarly, the FOP and numerous incumbent officers
22 object that the use of retroactive seniority will violate
23 incumbents' equal protection rights under both the United
24 States and Pennsylvania constitutions.

25 To begin, I question whether, in fact, the Consent

1 Decree implicates at all Equal Protection concerns, since
2 the Decree arguably creates no gender-base classification at
3 all. As United States correctly points out, the Decree does
4 not contain any infirmative action provisions, but instead
5 limits the available relief to individuals specifically
6 identified as victims of discrimination. See United States
7 versus New Jersey, *supra*, at 18. Such gender-conscious
8 relief is appropriate to remedy past gender discrimination.

9 Assuming only for the sake of argument that the
10 hiring relief and retroactive seniority provisions do
11 implicate equal protection issues, I find that these
12 provisions easily pass constitutional muster.
13 Classifications based on gender have traditionally been
14 subject to "intermediate" or "heightened" scrutiny such that
15 the classification is constitutional if it is substantially
16 related to the achievement of an important governmental
17 objective. See *Personal Administrator of Massachusetts*
18 *versus Feeney*, and 42 U.S. 256, 272-73 (1979). Because, in
19 my opinion, the challenged provisions of the consent Decree
20 would easily pass even the "strict scrutiny" normally
21 applied to race-based classifications, they are
22 constitutionally sound.

23 Appendix A to the Consent Decree sets forth the
24 presumptive hire dates for each potential claimant, which is
25 calculated as the earliest date of hire of any applicant who

1 took and passed the PAT when the potential claimant failed
2 the PAT. The Consent Decree contemplates that this
3 presumptive hire date will be used as the retroactive
4 seniority of the potential claimant if she is offered a
5 position as a priority hire and successfully completes her
6 probationary period.

7 One objector has asserted that because the City
8 used each of its police officer eligibility lists for two
9 years, it is possible that an individual hired under the
10 Decree may be awarded a retroactive seniority date which is
11 earlier than the date on which she actually would have been
12 hired. Notwithstanding this possibility, I conclude that
13 the retroactive seniority dates are fair and reasonable. As
14 the United States observes, the parties have agreed to these
15 dates because it is impossible as a practical matter to
16 determine exactly when any given claimant would have been
17 hired had she passed the PAT. Moreover, considering the
18 small number of priority hires contemplated by the Consent
19 Decree, the limitations placed on the use of retroactive
20 seniority and a likelihood that the claimants receiving
21 priority hire will be those who will receive the least
22 extent of retroactive seniority, this objection fails to
23 dissuade the Court from its conclusion that the priority
24 hiring dates are reasonable.

25 Appendix A to the Consent Decree purportedly lists

1 all individuals eligible for relief and was compiled from
2 the City's existing records of who took and failed the PAT
3 during the relative time period. I learned at the hearing
4 today that through inadvertence, the City apparently
5 disposed of its formal records of those who the test for the
6 years 1996 and 1998. Two objectors have come forward
7 claiming that they, in fact, took the test but that the
8 lists which accompany the United States papers does not
9 include them. One is Ethel Easter and the other is Francis
10 Boothe. I am going the direct that both those individuals
11 names be added conditionally to the list of eligibles with
12 the understanding that it will be incumbent upon each of
13 those individuals at an individualized fairness hearing to
14 demonstrate the fact that they did, in fact, take the test
15 and are otherwise eligible.

16 Finally, the Pension Association has filed a
17 response seeking to appear at the fairness hearing relative
18 to how the retroactive seniority awarded under the Decree
19 will affect the pensions of individuals hired as priority
20 hires. As the United States has correctly observed, the
21 Consent Decree specially contemplates that retroactive
22 seniority as awarded under the Decree is not to be used as
23 seniority for purposes of pension benefits. Thus, because
24 the retroactive seniority awarded under the Decree is solely
25 a "creature of the Decree" and has no meaning or application

1 outside of it, this provision should have no effect, or at
2 most a minimal effect, on the pensions of individuals hired
3 as priority hires.

4 Let me say that again because that was inaccurate.
5 This provision should have no effect on the pensions of
6 individuals hired as priority hires. Otherwise stated, for
7 pension benefit purposes, individuals offered positions as
8 priority hires will be treated as if they began accruing
9 seniority on the date on which they actually are hired by
10 the City.

11 As the Supreme Court observed:

12 Consent decrees are entered into by parties to a
13 case after careful negotiation has produced agreement on
14 their precise terms. The parties waive their right to
15 litigate the issues involved in the case and thus save
16 themselves the time, expense, and inevitable risk of
17 litigation. Naturally, the agreement reached normally
18 embodies a compromise; in exchange for the saving of cost
19 and elimination of risk, the parties each give up something
20 that they might have won had they proceeded with
21 litigation." United States versus Armour & Co., 402 U.S.
22 673, 681 (1971).

23
24 Thank you. We're adjourned.
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(Hearing concluded at 11:23 a.m.)

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